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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 OSCAR WILLIAMS, JR.,

11 Plaintiff,

12 v.

13 STEVEN TURNER, *et al.*,

14 Defendants.  
15

Case No. 2:09-CV-01979-KJD-GWF

**ORDER**

16 Before the Court is Defendants Hanke and Donat's Motion to Dismiss (#52). Plaintiff filed  
17 an opposition (#54) and Defendants filed a reply (#55).

18 **I. Background**

19 Plaintiff Oscar Williams, Jr., an inmate at Southern Desert Correctional Center, filed his First  
20 Amended Complaint (#16) on May 7, 2010, alleging three claims for relief pursuant to 42 U.S.C. §  
21 1983, against Warden William Donat ("Donat"), and correctional officers Alfred Hanke ("Hanke")  
22 and Steve Turner, arising out of an incident where Plaintiff's little finger was injured while he was  
23 incarcerated.

24 Plaintiff avers that on October 24, 2007, correctional officer Hanke "maliciously and  
25 sadistically and without justifiable cause or provocation, committed battery upon Plaintiff by bashing  
26 Plaintiff's right pinkie finger with a solid, hard, long-handled toilet brush for the express purpose of

1 causing plaintiff substantial harm and pain.” (Amended Complaint at 3.)

2 The Court issued an Order (#34) granting Steve Turner’s Motion to Dismiss on March 9,  
3 2011 and terminating Count II of the Amended Complaint. Defendants move to dismiss Count I and  
4 III of Plaintiff’s Amended Complaint which allege violations of the Eighth and Fourteenth  
5 Amendments, the Nevada Constitution, and various Nevada statutes.

## 6 II. Discussion

### 7 A. Legal Standard

8 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
9 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937,  
10 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the  
11 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow “the court to  
12 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. The Iqbal  
13 evaluation illustrates a two prong analysis. First, the Court identifies “the allegations in the  
14 complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal  
15 conclusions, bare assertions, or merely conclusory. Id. at 1949–51. Second, the Court considers the  
16 factual allegations “to determine if they plausibly suggest an entitlement to relief.” Id. at 1951. If the  
17 allegations state plausible claims for relief, such claims survive the motion to dismiss. Id. at 1950.

18 Plaintiff is representing himself *pro se*. Courts must liberally construe the pleadings of *pro se*  
19 parties. See United States v. Eater, 902 F.2d 1383, 1385 (9th Cir. 1990). However, “pro se  
20 litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of  
21 record.” Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir.1986).

### 22 B. Fourteenth Amendment Claims

23 Amendment XIV to the United States Constitution states “nor shall any state deprive any  
24 person of life, liberty, or property, without due process of law.” Article 1, Section 8, Clause 5 of the  
25 Nevada Constitution contains a similarly worded prohibition. The Supreme Court of Nevada looks  
26 to federal case law for guidance in its interpretation of the Due Process Clause. Reinkemeyer v.

1 Safeco Ins. Co. of Am., 117 Nev. 44, 16 P.3d 1069 (2001). “To establish a violation of substantive  
 2 due process ..., a plaintiff is ordinarily required to prove that a challenged government action was  
 3 clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals,  
 4 or general welfare.” Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996)(citations, internal  
 5 quotations and brackets omitted), *cert. denied*, 520 U.S. 1240 (1997). “[T]he Due Process Clause is  
 6 simply not implicated by a negligent act of an official causing unintended loss of or injury to life,  
 7 liberty, or property.” Daniels v. Williams, 474 U.S. 327, 328 (1986).

8 Plaintiff complains that Donat knew or should have known that his alleged “failure to take  
 9 effective steps to shield and protect Plaintiff and other inmates from [Hanke’s] violent propensities  
 10 enabled [Hanke] to bash Plaintiff’s hand with a hard toilet brush” was in violation of Plaintiff’s “due  
 11 process rights under the Fourteenth Amendment... Article 1 § 8 of the Nevada Constitution, and a  
 12 violation of Plaintiff’s right against oppression under NRS 197.200.” (Ameded Compl. at 11).  
 13 Plaintiff does not allege that Donat deliberately did anything to deprive him of his rights or directed  
 14 anyone else to deprive Plaintiff of his rights – only that he failed to take care in preventing a  
 15 deprivation that he knew or should have known may happen. “[T]he protections of the Due Process  
 16 Clause, whether procedural or substantive, are just not triggered by lack of due care by prison  
 17 officials.” Davidson v. Cannon, 474 U.S. 344, 348 (1986). Plaintiff’s due process claim against  
 18 Donat fails.<sup>1</sup>

19 Plaintiff’s due process claim against Hanke is conclusorily pled and devoid of facts showing a  
 20 due process violation. Accordingly, the Fourteenth Amendment claims against both Defendants are  
 21 dismissed.

### 22 C. Eighth Amendment Claims Against Donat

23 Liability for Eighth Amendment violations under 28 U.S.C. § 1983 cannot be predicated on  
 24 the theory of *respondeat superior*. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.1989). “A  
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26 <sup>1</sup> Plaintiff cannot recover under NRS 197.200 because it is a criminal statute and is inapplicable here.

supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.” *Id.* It is well established that there is no *respondent superior* liability under § 1983. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th Cir. 1984). Absent an official’s participation or direction in the violation of a plaintiff’s constitutional rights, he cannot be held personally liable in an individual-capacity suit under § 1983. Ybarra, 723 F.2d at 680. Thus, “to succeed on a cause of action under section 1983, the plaintiff must prove the defendant[s] [were] the cause in fact and the proximate cause of plaintiff’s injuries.” Kraft v. Jackson, 669 F. Supp. 333, 339 (D.Nev. 1987), *aff’d*, 872 F.2d 862 (9th Cir. 1989).

Plaintiff has not alleged that Donat personally participated in the event at issue here or that he was the cause in fact or proximate cause of Plaintiff’s alleged injury, only that Donat knew or should have known of Hanke’s allegedly “violent propensities.” Plaintiff offers no specific facts showing that Donat was aware prior to the incident on October 24, 2007, that Hanke would strike Plaintiff. Accordingly, Plaintiff fails to state an viable Eighth Amendment claim against Donat.

#### D. Eighth Amendment Claim Against Hanke

A prison official violates the Eighth Amendment when: (1) the condition of confinement objectively poses a substantial risk of serious harm (extreme deprivation); and (2) the prison official knows of the substantial risk and ignores it (deliberate indifference or criminal recklessness). Farmer v. Brennan, 511 U.S. 825, 834-37 (1994); Hudson v. McMillian, 503 U.S. 1, 9 (1992). Both of these factors must be present to establish a violation of the Eighth Amendment.

“[Not] every malevolent touch by a prison guard gives rise to a federal cause of action.” Hudson v. McMillan, 503 U.S. 1, 9 (1992). To determine if excessive physical force is in violation of the Cruel and Unusual Punishments Clause, courts must inquire “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Id.* at 6-7. To establish a violation, a plaintiff must demonstrate that the use of physical force was unjustified based on: (1) the extent of injury suffered by an inmate; (2) the need for application of

1 force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably  
2 perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful  
3 response. Hudson, 503 U.S. at 7. “The absence of serious injury is therefore relevant to the Eighth  
4 Amendment inquiry, but does not end it.” Id. “The Eighth Amendment’s prohibition of ‘cruel and  
5 unusual’ punishments necessarily excludes from constitutional recognition de minimus uses of  
6 physical force, provided that the use of force is not a sort ‘repugnant to the conscience of mankind.’”  
7 Id. at 9-10.

8 In Count I Plaintiff alleges violation of the Eighth Amendment and the similar provision in  
9 the Nevada constitution. He also alleges violation of several Nevada statutes which are not  
10 applicable here.<sup>2</sup> These allegations all arise from a single incident where “[Hanke] maliciously and  
11 sadistically carried out his verbal threat and smashed Plaintiff’s hand with a hard toilet brush causing  
12 excruciating pain and permanent disfigurement to Plaintiff’s right pinkie finger.” Plaintiff pleads no  
13 other facts to show that application of force was unnecessary, that the amount of force was excessive,  
14 whether Hanke perceived a threat, or whether any other factors were at play. Plaintiff does not plead  
15 facts showing that the injury required any medical treatment. The Complaint provides nothing  
16 besides labels and conclusions showing that the alleged incident constituted a violation of the Eighth  
17 Amendment. Accordingly, this claim is dismissed.

18 F. Failure to Serve Donat and Hanke

19 Because Plaintiff’s complaint is dismissed for failure to state viable causes of action against  
20 Defendants, the question of whether Plaintiff accomplished timely service upon Donat and Hanke is  
21 moot. Accordingly, the Defendants’ alternative argument for dismissal for failure to serve  
22 Defendants pursuant to Fed. R. Civ. P. 12(b)(5) fails.

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25 <sup>2</sup> NRS 197.200 and NRS 212.020 are criminal statutes. NRS 209.471 and NRS 209.481 are general correction  
26 regulations that are not at issue here. NRS 209.371, which prohibits corporal punishment and inhumane treatment, does  
not provide more protection than the Eighth Amendment.

1           G. Leave to Amend

2           If the Court grants a motion to dismiss a complaint, it must then decide whether to grant leave  
 3 to amend. Courts should “freely give” leave to amend when there is no “undue delay, bad faith[,]”  
 4 dilatory motive on the part of the movant ... undue prejudice to the opposing party by virtue of ... the  
 5 amendment, [or] futility of the amendment....” Fed.R.Civ.P. 15(a); Foman v. Davis, 371 U.S. 178,  
 6 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Generally, leave to amend is only denied when it is clear  
 7 that the deficiencies of the complaint cannot be cured by amendment. See DeSoto v. Yellow Freight  
 8 Sys., Inc., 957 F.2d 655, 658 (9th Cir.1992).

9           The Court has doubts that the defects in Plaintiff’s Complaint can be cured by amendment.  
 10 However, considering the generous standards afforded to *pro se* litigants, the Court will not preclude  
 11 further amendment of the Complaint. If Plaintiff decides to file an second amended Complaint, he  
 12 must comply in every respect with the Federal Rules of Civil Procedure. Any amended Complaint  
 13 should be filed on or before Monday March 5, 2012. Failure to file in accordance with this Order  
 14 will result in dismissal without leave to amend.

15           III. Conclusion

16           **IT IS HEREBY ORDERED THAT** Defendants Hanke and Donat’s Motion to Dismiss  
 17 (#52) is **GRANTED**.

18           **IT IS FURTHER ORDERED** Plaintiff may file an amended complaint that  
 19 complies in every respect with the Federal Rules of Civil Procedure by March 5, 2012. Failure to  
 20 do so will result in dismissal of the action without further leave to amend.

21           DATED this 30<sup>th</sup> day of January 2012.

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 26           Kent J. Dawson  
               United States District Judge